J. W. Field Company v. Franklin (date?)

Reply Brief of J. W. Field Co., Inc.

Pgs. 14

ML 000065B

IN THE SUPREME COURT

J.W. FIELD COMPANY, INC. and JACK W. FIELD,	:	
Plaintiffs-Respondents	:	DOCKET NO. 24,799 CIVIL ACTION
vs.	:	MOUNT LAUREL LITIGATION
TOWNSHIP OF FRANKLIN, PLANNING BOARD OF TOWNSHIP OF FRANKLIN, FRANKLIN TOWNSHIP SEWERAGE AUTHORITY AND STONY BROOK REGIONAL SEWERAGE AUTHORITY	:	ON APPEAL FROM INTERLOCUTORY ORDER OF SUPERIOR COURT, LAW DIVISION
	:	SAT BELOW:
Defendants - Appelation	:	Honorable Eugene D. Serpentelli, A.J.S.C.

REPLY BRIEF OF J.W. FIELD COMPANY INC.

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INTRODUCTION

All plaintiffs in the transfer cases have attempted to demonstrate that transfer in the twelve cases was properly denied; all municipalities have sought to demonstrate that transfer should have been granted. Except for the Urban League brief p 50-54, no brief that Field has reviewed has considered any transfer decision that might attempt to balance the interests of Mt. Laurel plaintiffs and municipalities. Although Field still submits that transfer was properly denied unconditionally in Franklin, this reply brief will consider the possibility of a denial of transfer with conditions that would give a municipality some benefits of the Fair Housing Act.

Such a conditional response would require an immediate implementation of part of a municipality's fair share. In the words of Mt. Laurel II " 92 N.J. at 308 "it is time that something be built" as a result of these prolonged Mt. Laurel lawsuits. Nevertheless, once immediate implementation was undertaken, the court could allow the municipality to postpone redetermination of the municipality's ultimate fair share until the first Affordable Housing Council decisions were rendered. Thus, the municipality without transfer could receive the benefits of any Council revisions in fair share methodology or implementation. The remainder of this reply brief will demonstrate the legal foundation for such an equitable decision and try to elaborate upon the terms of such a decision.

THE IMPLEMENTATION OF MT. LAUREL II 1983-1985

A. MT. LAUREL SETTLEMENTS

On January 20, 1983 this Court decided Southern Burlington County N.A.A.C.P. v. Mt. Laurel Tp. II 92 N.J. 158 (1983). In that decision this Court reaffirmed that municipalities have a constitutional obligation to provide a realistic opportunity for lower income housing. In writing the Mt. Laurel II decision, this Court sought to encourage voluntary municipal compliance, while at the same time increasing the effectiveness of the judiciary in resolving Mt. Laurel litigation.

The Mt. Laurel II decision has produced impressive results. The three oldest exclusionary zoning cases in the state have been settled. Judge Gibson on September 6, 1985 approved a final settlement in Southern Burlington County N.A.A.C.P. v. Mt. Laurel Township which gave Mt. Laurel Township a six year judgment of repose. A companion case to Mt. Laurel, Urban League of Essex County v. Township of Mahwah, 92 N.J. 158, 332 (1983) which this Court recognized had been going on "for more than a decade", also settled this year. Likewise, the Bedminster litigation filed in 1971 is now resolved; Judge Serpentelli approved the settlement of this "teenager" and granted repose in a decision which has been approved for publication, Alan Deane v. Bedminster _____ N.J. Super _____ (Law Div. 1985). (slip opinion at

one) Moreover, as Judge Skillman noted in his transfer decision, the Public Advocate reached settlements with all but two of the twelve Morris County defendants in Morris County Fair Housing Council v. Boonton Township (Law Div. October 28, 1985) (hereinafter Morris County; slip opinion at 49).

The settlements have occurred in part because of the diligent efforts of the Mt. Laurel trial courts in finding ways to encourage settlements. The trial courts have allowed municipalities which voluntarily comply with their Mt. Laurel II obligation to institute declaratory judgement actions by which they can obtain judgments of repose. See Allan Deane supra at 4. In addition, once Mt. Laurel litigation has been initiated against a municipality, the trial courts have issued immunity orders protecting the municipality from further litigation in cases in which the municipality conceded the invalidity of its zoning ordinance and asked for time to rezone. In Judge Serpentelli's oral decision in the transfer motion of Z.V. Associates v. Borough of Watchung (L-085321-84, October 4, 1985), he noted that he has entered approximately seventeen such orders. (slip opinion at 30, A-9)

Thus, while this Court has before it in these transfer cases some of the most bitterly contested exclusionary zoning litigation in the state, this should not obscure the fact that there has been substantial progress in implementing Mt. Laurel II through settlements. Moreover, as will be shown in

the following section, a large number of municipalities in the state which have never been involved in Mt. Laurel litigation are now voluntarily indicating their willingness to participate in the Affordable Housing Council process. Furthermore a smaller but still significant group of New Jersey municipalities which are in Mt. Laurel litigation are choosing to finish up their cases in the courts rather than seek transfer. It is in this context of substantial statewide progress, that the transfer cases must be evaluated.

B. THE MUNICIPAL RESPONSE TO THE AFFORDABLE HOUSING COUNCIL

The following chart* shows the number of municipalities which have submitted a Resolution of Participation to the Affordable Housing Council pursuant to Section 9 of the Fair Housing Act; a resolution is a pre-requisite to participation. It also shows the number of municipalities which are presently defendants in Mt. Laurel litigation. With respect to municipalities which have filed Resolutions of Participation, it compares the number of municipalities in Mt. Laurel litigation with those not in litigation; likewise, with respect to municipalities in Mt. Laurel litigation, it shows the municipalities which have filed Resolutions of Participation and which have not.

* The information about municipalities submitting Resolutions of Participation is taken directly from the New Jersey Council on Affordable Housing's list of municipalities filing resolutions of participation. A-23. The list of municipalities in Mt. Laurel litigation is taken from the Administrative Office of the Court's December 5, 1985 listing of pending Mt. Laurel cases (A-36)

	Resolutions Of Participation				Municipal Defendants In Mt. Laurel Litigation		
	Municipalities In Cty.	Resolutions of Participation Filed	Resolutions Filed by Munis In Litigation	Resolutions Filed by Munis Not In Litigation	Munis In Mt. Laurel Litigation	Munis In Litigation Filing Resolutions	Munis In Litigation Not Filing Resolutions
Atlantic	23	5	0	5	1	0	1
Bergen	70	23	1	22	4	1	3
Burlington	40	16	1	15	3	1	2
Camden	37	4	1	3	3	1	2
Cape May	16	5	0	5	0	0	0
Cumberland	14	1	0	1	0	0	0
Essex	23	8	1	7	1	1	0
Gloucester	24	4	0	4	0	0	0
Hudson	12	3	0	3	0	0	0
Hunterdon	26	19	4	15	4	4	0
Mercer	13	6	3	3	5	3	2
Middlesex	26	7	4	3	7	4	3
Monmouth	53	14	7	7	11	7	4
Morris	40	10	6	4	15	6	9
Ocean	34	3	0	3	0	0	0
Passaic	16	7	1	6	2	1	1
Salem	15	1	0	1	0	0	0
Somerset	21	9	8	1	11	8	3
Sussex	24	11	1	10	1	1	0
Union	21	5	0	5	0	0	0
Warren	23	8	0	8	0	0	0
State of New Jersey		169	38	131	68	38	30

There are some important conclusions that follow from this chart.*

1. Over 75 % of the municipalities which have filed Resolutions of Participation are not involved in Mount Laurel

* It should be stressed that there could be errors in the lists from which this information is taken. The purpose of this chart is not to give exact numbers but rather to give a general overview of the state of Mt. Laurel implementation today.

litigation. While some of these municipalities may ultimately choose not to seek substantive certification, it should be noted that Section 30 of the Affordable Housing Act requires every municipality in the state to adopt a housing element by August 1, 1988. Thus, regardless of this Court's decision on the transfer motions, the Affordable Housing Council's implementation of the Act will have a major impact on land use practices of these New Jersey municipalities which have never been in Mt. Laurel litigation.

2. Almost 60% of the municipalities in Mount Laurel litigation (38 out of 68) have filed resolutions of participation with the Affordable Housing Council. Significantly, however, over 40% (30 out of 68) have not. It is suggested that a large number of these municipalities are close to resolving their Mt. Laurel disputes in the courts and prefer resolution there to transfer to the brand new Council.

The remainder of this brief will focus upon possible equitable resolutions of those litigated cases in which transfer is sought.

I. THIS COURT HAS THE POWER TO GRANT OR DENY TRANSFER SUBJECT TO EQUITABLE CONDITIONS

In each draft of the Fair Housing Act up to and including the final version incorporating the governor's conditional veto, the Legislature proposed a two-tiered system. Under the two-tiered system some exclusionary zoning cases would remain within the jurisdiction of the courts while some would be decided by the Affordable Housing Council. A two-tiered system for deciding cases is nothing new. Since the beginning of our nation, we have operated under a judicial system consisting of parallel state and Federal courts. Under this dual system two very similar cases could be filed and tried to completion, one in a state court and one in a Federal court.

Despite the two centuries of experience with our dual system of justice, there are still circumstances in which there are extraordinary difficulties in deciding whether cases must be tried in state or in Federal courts. This difficulty is perhaps best illustrated by the forty years of United States Supreme Court decisions on abstention commencing with Railroad Commission of Texas v. Pullman 312 U.S. 496 (1941) and Burford v. Sun Oil Co. 319 U.S. 315 (1943) and continuing even up until today.

In view of this history, it is not surprising that the New Jersey Legislature had a great deal of difficulty in establishing standards to determine which cases should be transferred to the Affordable Housing Council and which should not. Judge Skillman's opinion in Morris County supra

traces the changes in the standards for transfer from introduction of the first Lipman bill* to the final standard of "manifest injustice" enacted into law. To this end Judge Skillman analyzed both the majority and minority statements of the Assembly Municipal Government Committee concerning the change in standard. Id at 42-44.

Judge Skillman correctly noted that neither the Act nor the accompanying legislative statement provides a definition of the term "manifest injustice" or any other guidance as to its interpretation. Id at 44. This is nothing new. The Legislature has frequently enacted Legislation directing either administrative agencies or the Courts to decide cases or carry out functions based upon the most general and undefined terms.**

In view of the absence of specific Legislative guidance, Judge Skillman concluded that it is the responsibility of the courts to interpret the term "manifest injustice" "in a manner in which is consistent with the overall intent of the

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* S-3024

** See Ward v. Scott 11 N.J. 117, 123-24 (1952) where this Court held that the Legislature could constitutionally allow a zoning board to determine whether "special reasons" existed sufficient to grant a variance. In Ward, supra at 124, the Court noted that the Board of Public Utility Commissioners has been charged by the Legislature with the task of deciding utility cases based upon the standards of "just and reasonable. See also Mt. Laurel Tp. v. Public Advocate of N.J. 83 N.J. 522 (1980). Likewise, the Legislature has told the judiciary in deciding whether certain senior citizens in condominium conversions get forty year protection from eviction to consider whether the application of the statute to a particular case would violate" concepts of fundamental fairness. Senior Citizen and Disabled Protected Tenancy Act, N.J.S.A. 2A:18-61.11d(2); See Troy Ltd v. Renna 727 F2d 727 (3rd Cir, 1984)

Act and which will not undermine theconstitutional rights protected by the Mount Laurel doctrine" Morris County supra at 44.

In the twelve cases pending before this Court, Judges Skillman and Serpentelli concluded in eleven of them that manifest injustice would result if a transfer were permitted. The two judges denied transfer in eleven out of the twelve cases even though Judge Skillman recognized that the Fair Housing Act "in its final form expresses a stronger preference than earlier versions for transfer of pending cases to the Council" Morris County supra at 44. Without repeating the facts in those twelve cases, it is submitted that these decisions were not arbitrary. Nevertheless, no party in any of the twelve cases suggested the possibility of transfer with conditions or the denial of transfer subject to conditions; nor do the decisions of the trial courts consider such a possibility. Faced with an all or nothing decision, to transfer or deny transfer, Judges Skillman and Serpentelli felt that the decisions which they rendered were necessary to avoid "manifest injustice."

Field suggests that transfer need not be an all or nothing proposition. Rather, this court has discretion in appropriate cases to grant transfer subject to conditions that reduce at least part of what would otherwise be manifest injustice or to deny transfer subject to conditions that gives the municipality essentially the same benefits that it would receive if transfer were permitted.

A conditional transfer or conditional denial of transfer in appropriate cases could be consistent with the Fair Housing Act and with New Jersey's judicial history. In establishing the standard of manifest injustice, the Legislature was directing the Court to do what the judiciary has always sought to achieve: reach a just and equitable decision; avoid an inequitable result, i.e. one that would result in a manifest injustice.

Even before the adoption of New Jersey's Constitution in 1948, the broad equitable power of New Jersey courts to devise equitable relief to fit the circumstances of each case was well recognized. Judge Heher in 1938 declared:

> "Equitable remedies are distinguished for their flexibility, their unlimited variety, their adaptability to circumstances, and the natural rules which govern their use. There is in fact no limit to their variety and application; the court of equity has the power of devising its remedy and shaping it so as to fit the changing circumstances of every case and the complex relation of all the parties. Sears Roebuck & Co v. Camp 124 N.J. Eq 403 (E & A 1938).

See also Cooper v. Nutley Sun Printing Co., Inc. 36 N.J. 198 (1961), Vasquez v. Glassboro Service Assn. 83 N.J. 86 (1980), Mt. Laurel II supra at 285-289; State v. U.S. Steel 22 N.J. 341, 357 (1956):

Before discussing the equitable conditions that could be imposed, it is important to summarize what is fundamentally at issue in the transfer motions, both from the perspective of the Mt. Laurel plaintiffs, whether they be developers or low income representatives, and from the municipalities.

The objections of Mt. Laurel plaintiffs to transfer are twofold:

1. Unnecessary delay. Even based on Judge Skillman's optimistic timetable, the low income housing that could be provided through Mt. Laurel cases will be postponed indefinitely if transfer is allowed. This point will be extensively discussed in point two.

2. Loss of a builder's remedy. The Fair Housing Act does not specifically provide for a builder's remedy. See Morris County supra at 39; Urban League brief at 55. Yet without this, the prime engine for producing Mt. Laurel compliance as well as Mt. Laurel housing will be removed.

The municipal reasons for seeking transfer are:

1. Reduction in fair share. It is no secret that municipalities hope by transfer to achieve a recalculation and substantial reduction in their fair share obligation. One reason that the Republican legislators on the Assembly Municipal Government Committee sought to require mandatory transfer of all cases was their dissatisfaction with the "housing quotas established in the Warren decision." Minority Statement, February 28, 1985.

2. Dissatisfaction with builder's remedies. The municipal concern about being overwhelmed by builder's remedies is recognized in the Fair Housing Act, Section 3.

Having explored these major concerns, it is now apparent what interests an equitable condition transfer decision would

have to balance. It would assure immediate implementation of some part of the fair share, while permitting six year fair share decisions to be based upon a consideration of Council fair share criteria. It would assure some immediate authorization of lower income housing through builder's remedies, while ultimately allowing municipalities to provide a substantial portion of its Mt. Laurel housing through methods other than a builder's remedy. The remainder of the brief will discuss such an equitable remedy.

II. ANY EQUITABLE CONDITION MUST INCLUDE THE REQUIREMENT THAT THE MUNICIPALITY IMMEDIATELY PROVIDE A PORTION OF ITS ULTIMATE FAIR SHARE OBLIGATION.

Municipalities in briefs before this court have argued that an administrative agency can better determine fair share than the courts; municipalities have also argued that low income housing should be provided in ways other than through builder's remedies. No municipality, however, has argued that delay in the provision of low and moderate income housing is desirable.

In Abbott v. Burke, 100 N.J. 269, 303 (1985) , this court in ordering the plaintiff to exhaust administrative remedies stated that it was confident that all proceedings before the administrative agencies "can and will be expedited." Such confidence about expedited procedure before the Affordable Housing Council is not possible in these Mount Laurel cases. Of course, if "law of the case"* doctrine applied to transferred cases and the Affordable Housing Council would not reconsider anything that had previously been decided by a Mount Laurel judge, expediting the cases after transfer would be easy. If, however, transfer means that nothing decided by a trial court prior to transfer can be reconsidered by the Council, there would be scant reason to allow transfer. On the other hand, if transfer means that everything decided by a trial court is relitigated anew before the Council after transfer, it is virtually impossible for this court or the Council to expedite transferred cases.

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* See Urban League brief, pages 34-44

Judge Skillman's timetable in Morris County contains the most expedited timetable feasible*. For example, there is no time period whatsoever in his schedule for mediation; similarly, this Court declared as part of its effort to expedite the administrative process in Abbott supra at 302 fn 6 that mediation would be futile in view of the prolonged litigation and therefore should not be attempted by the Department of Education. Further, Judge Skillman in his timetable assumed the minimum possible period of time for each step in the administrative process despite serious doubts that those timetables could be met. Even so, Judge Skillman concluded that the exhaustion of the administrative process would, nevertheless, still take until September 1, 1987. At that point, appellate review of novel and important questions would begin, i.e. whether the final Council decision, based upon the Affordable Housing Council's application and interpretation of the Act and the regulations, complied with Mt. Laurel II. Despite Judge Skillman's timetable, there is a substantial liklihood that the cases will not get to a point where they are ready for appellate review until well beyond September 1, 1987. Obviously, all proposed low income housing in the affected municipalities would be placed on hold during this period. It is this substantial unnecessary delay that fuels the claim of manifest injustice.

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* See Morris County supra p. 17 fn 6

III. A DENIAL OF TRANSFER CONDITIONED UPON IMMEDIATE IMPLEMENTATION OF A PORTION OF THE MUNICIPALITY'S FAIR SHARE WHILE PERMITTING THE MUNICIPALITY TO POSTPONE DETERMINATION OF ITS SIX YEAR FAIR SHARE OBLIGATION UNTIL FINAL COUNCIL STANDARDS WERE APPROVED COULD IN APPROPRIATE CASES PROTECT BOTH THE MT. LAUREL PLAINTIFFS AND THE MUNICIPALITY

The thesis of this reply brief is that if this Court is seeking to reach an equitable resolution of a transfer motion, the indispensible condition is immediate implementation of some portion of the municipal fair share obligation. Theoretically, there are at least three ways that this could be done. First, as Urban League of Greater New Brunswick proposes in its brief pp 50-54, a transfer motion could be granted subject to immediate enforcement by the trial court of a portion of the municipality's fair share obligation. Second, the case could be transferred on condition that the Council or an ALJ immediately, prior to adoption of Council guidelines, require the municipality to implement a portion of the fair share. This option does not appear to be feasible because the Council is presently overwhelmed by its statutory timetable requiring adoption of guidelines and criteria by August 1, 1986; furthermore the ALJ's with their complete lack of experience in Mt. Laurel matters are not in a position to expedite immediate implementation. The third alternative, discussed in this section, is to deny transfer but impose conditions both requiring immediate partial implementation and simultaneously giving municipalities protections equivalent to what they would receive from

transfer. This alternative which avoids splitting the case between two forums, the Council and the court, could be acheived by denying transfer but subjecting the parties to three conditions:

A. The municipality would be required to implement a phased-in portion of its fair share immediately. (Franklin's fair share obligation is 1715, according to Judge Serpentelli's decision, A-49; as will be shown later its phased-in obligation, hypothetically, might be 450).

B. While the municipality would implement the phased-in portion of its fair share immediately, it could postpone implementation of the remainder of its six year fair share obligation (1715-450 in Franklin) until the first contested Council cases have been completed. At that time the court could recalculate the municipality's six year fair share according to council criteria and develop an implementation plan for the remainder of the revised obligation, giving full consideration to Council decisions.

C. The municipality would be allowed to achieve a substantial portion of its remaining six year fair share which is postponed beyond initial implementation through means other than a builder's remedy in accordance with Council remedy decisions.

With these conditions, the interests of low income persons, developers and municipalities are at least somewhat protected. Indeed, with such protective conditions there is no reason why transfer should be necessary for a municipality.

The proposal for an equitable condition of immediate implementation requires consideration of Mount Laurel II and Section 23 of the Fair Housing Act. In Mount Laurel II, this court remanded the Mount Laurel case back to the trial court for a determination of Mount Laurel Township's fair share and for implementation of that fair share. At the same time, however, the Court granted Davis Enterprises a builder's remedy stating that in view of the extended litigation "it is time that something be built for the resident and non-resident lower income plaintiffs in this case who have borne the brunt of Mount Laurel's unconstitutional policy of exclusion." Mount Laurel II at 308 (emphasis added) Thus a final judgment granting a builder's remedy was entered prior to a final determination of fair share.

Based on the Davis precedent a final judgment could be entered obligating a municipality to immediately provide part of its fair share. At the same time, even though transfer was denied, it could be allowed to have determination of its six-year fair share obligation postponed until the Affordable

Housing Council fair share methodology had been fully established through final council decision.*

One further municipal concern should be raised. Many municipalities believe that if transfer is denied and they remain in court all of their fair share will have to be provided through builder's remedies. See J.W. Field Co., Inc v. Township of Franklin supra allocating priority for builder's remedies among eleven plaintiff-developers. Without underestimating the fundamental importance of a builder's remedy to the provision of lower income housing

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* Field's proposal involves an expansion of the procedure which was adopted by Judge Serpentelli in Z.V. Associates v. Borough of Watchung supra In this Mount Laurel case, a Consent Order was signed by Judge Serpentelli on June 19, 1985. The Consent Order fixed Watchung's fair share number and gave the municipality time to adopt an ordinance implementing that fair share. Nevertheless, the Consent Order preserved Watchung's right to seek modification of the municipality's fair share or implementation plan based upon subsequent Legislative enactments.

On October 4, 1985 Judge Serpentelli denied a motion by Watchung to transfer. He commented that Watchung was entitled pursuant to the Consent Order to seek modification of its fair share settlement by the trial court if it could demonstrate that it "would have done better before the Housing Council". (Watchung transcript at 33; A-8). Judge Serpentelli concluded:

> Watchung has an opportunity to settle now, and still later seek a reduction of the fair share based on what might happen in the Housing Council. That arrangement rings of fairness to the defendant. Id. A-10.

Under the circumstances there was no need for Watchung to transfer. Field submits that a denial of transfer by this Court with conditions could give the municipality even more protection than contained in the Watchung settlement.

(See Urban League brief p. 54), it is submitted that such a result is unnecessary. In the first place, Section 12 of the Fair Housing Act allows a municipality in a case which is not transferred to request a trial court to approve the transfer of up to 50% of its ultimate fair share obligation to another municipality through a regional transfer agreement which the court approves. See Morris County supra at 37. Second, while both the Oakwood at Madison v. Madison Township 72 N.J. 481 (1977) and Mount Laurel II decisions recognize the importance of builder's remedies in inducing compliance with Mt. Laurel, neither of those two decisions nor the precedents in other states upon which the New Jersey decisions are based* state that four, seven or eleven builder's remedies must be awarded in any one case. In Field supra, slip opinion at 6-7 Judge Serpentelli specifically described the disadvantages of having a large number of plaintiffs seeking a builder's remedy. Finally, it should be noted that as in the case of transfer a builder's remedy need not be an all-or-nothing proposition. For example, rather than being allowed a high density to provide a twenty per cent set-aside for lower income housing, a developer could be allowed a somewhat lower density on condition that he fund a regional transfer agreement pursuant to Section 12 or fund a municipal rehabilitation program. See Urban League brief p 73-4. In

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* See cases cited in Madison supra at 550

fact, for most municipalities this is the only possible funding source for a transfer Agreement. In view of all of these factors, Field submits that there are compelling reasons to award a developer's remedy at the immediate implementation stage to the first or second plaintiff; at the hearing on implementation of the six year fair share substantial consideration could be given to Council implementation measures other than a builder's remedy.

In determining the amount of housing necessary for immediate implementation, the trial court could take into consideration Section 23 of the Fair Housing Act. Section 23 provides a phasing schedule for cases in which the court retains jurisdiction over Mount Laurel cases. The Section in fact provides for two phasing schedules, the second and more important schedule being established only for low income housing constructed in inclusionary developments. Section 23e*. The phasing timetable runs from the effective date of the Act, July 1985. Id.

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* A municipality with a fair share obligation to provide over 2000 units in inclusionary developments is entitled to consideration of a phase in schedule of at least twenty years. For a municipality with 1500 to 1999 units, it is entitled to a consideration of at least fifteen years; for 1000 to 1499 at least ten years; for 500 to 999 at least six years; for under 500 such period of time as is determined by the court to be reasonable. Section 23e.

Field suggests that municipalities could be required to implement immediately a plan that would implement three years of their fair share obligation, i.e. their obligation pursuant to Section 23 between July, 1985 and July 1988. The three year time period is suggested because, in view of Judge Skillman's timetable in Morris County supra fn 6 suggesting May 1987 as the earliest possible date for final Council decisions, revised fair share hearings could not begin before the Court until sometime after that date. Since there would also be a need for a review of compliance plans a a time for revisions of zoning ordinance, no applications for Planning Board approval pursuant to the final six year implementation plan could realistically be expected prior to 1988.

Thus, Franklin would be obligated to implement that part of its fair share which should be achieved in three years. Its fair share is 1715.* Assuming that it was all provided through a builder's remedy or remedies, there could have to be consideration of a 15 year phasing plan, pursuant to Section 23e. This could mean 115 new low income units a year constructed from July 1985 to July 1988 for a total of approximately 450 Mt. Laurel units through interim builders' remedies in Franklin.

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* Alternatively the reply brief of the plaintiff in Real Estate Equities v. Holmdel is proposing that an interim implementation plan could be based upon the fair share obligation which the municipality at trial admitted to, rather than the Court's ultimate decision. Of course, an admission minimizes the possibility of an appeal judicial reliance upon since at least to the fair share admission, there can be no contested factual issue.

For this equitable solution to work, any aggreived party must have the right to appeal from the immediate implementation plan. Were such a right of appeal not available, any developer would commence construction at his peril, facing the risk that somewhere down the road when the six year plan were finally implemented there would be a challenge to his prior approval. Compare Crema v. New Jersey Dept. of Environmental Protection 94 N.J. 286,294 fn 8. Thus, without provision for immediate appeal to obtain finality of any order, the immediate implementation plan might not produce any housing. Of course, in the absence of an appeal, applications for site plan and subdivision approval for the housing could commence immediately. Nevertheless, even if an appeal were taken the scope of municipal appeal from a three year implementation plan would be very narrow: in light of the possible six year fair share obligation was the interim obligation or remedy (e.g. 450 out of a fair share of 1715 in the case of Franklin) so far off the mark as to be arbitrary and capricious. Indeed, in view of the limited nature of the appeal and the limited number of cases in which such a remedy would apply, expedited appeals might well be appropriate. Compare DeSimone v. Greater Englewood Housing Corp 56 N.J. 428 (1970).

After immediate implementation and after the court had the benefit of final Council decisions on substantive certification, it could then determine the municipality's six-year fair share obligation and review the municipality's

final implementation plan. Thus, there would be no need for transfer. The municipality would be able to obtain the ultimate benefit of the Council fair share methodology and implementation measures and a limitation upon builder's remedies. Yet, the same court which heard the case prior to passage of the Fair Housing Act would maintain jurisdiction over the case so that there would not be duplicative bifurcation.

CONCLUSION

In his prior brief, Field has urged that the Franklin motion to transfer should be denied. In this reply brief, Field has sought to explore other options to an either-or transfer or deny transfer situation. In essence, there are four options, each of which might be appropriate in particular cases:

1. Transfer unconditionally. This may be appropriate in very new cases or in cases that have not gone to trial.

2. Transfer subject to a condition that the municipality immediately implement a percentage of its judicially determined fair share. See Urban League of Greater New Brunswicks brief, p 50-54.

3. Deny transfer subject to the conditions contained in this brief.

4. Deny transfer unconditionally.

In the prior brief, Field has discussed why the decision below should be affirmed. Alternative, if the Court is not prepared to deny transfer unconditionally, the third option would avoid at least part of the manifest injustice that would be occasioned by an unconditional transfer.

Respectfully submitted,

FRIZELL & POZYCKI

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